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NO. 98-1964

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1998

GEORGE ALARICK JONES,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **Whether Jones' claim that the state court's refusal to follow its own precedent violates the Sixth, Eighth, and Fourteenth Amendments raises only a state law question and is thus not appropriate for the Court's review.**

2. **Whether Jones failed to raise in the court below his claim that the introduction of evidence of unadjudicated offenses in the punishment hearing of capital cases violates the Eighth and Fourteenth Amendments; whether the claim is otherwise without merit.**

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through the Attorney General of Texas, and files this

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[1] The Petitioner will be referred to as "Jones," and the Respondent as "the State." "Pet." refers to the Petition; "SR" refers to the transcription of the testimony at trial, by volume and page number.

Brief in Opposition.

OPINION BELOW

The published opinion of the Texas Court of Criminal Appeals affirming Jones' conviction and sentence of death is attached to Jones' petition. *Jones v. State*, 982 S.W.2d 386 (Tex. Crim. App. 1998) (en banc).

JURISDICTION

Jones seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Jones bases his claims upon the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Jones was indicted on September 21, 1994, in the 292nd Judicial District Court of Dallas County, Texas, for the capital offense of murdering Forest J. Hall while in the course of robbery.[2] *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (West 1996 Supp.). Jones was tried before a jury upon his

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[2] This was Jones' second trial. A mistrial was declared after eight jurors were selected in his first trial.

plea of not guilty and found guilty of the capital offense on March 22, 1995. On March 29, 1995, following a separate punishment hearing, the jury answered the statutory special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071 "yes" and "no", respectively. In accordance with state law, the trial court assessed Jones' punishment at death.

Jones appealed his conviction and sentence to the Court of Criminal Appeals of Texas, which affirmed his conviction and sentence on September 16, 1998. *Jones v. State*, 982 S.W.2d 38 (Tex. Cr. App. 1998) (en banc). This petition followed.

B. Statement of Facts

1. Guilt-Innocence Phase

The victim, Forest Hall, was 22 years old and employed by Parkland Hospital. On April 13, 1993, the day of the murder, Hall drove his vehicle to work. 54 SR 45. The vehicle had a stereo and small wheels. 54 SR 44. Hall left work at 4:45 p.m. 54 SR 46. Hall's body was found in a roadside ditch later on April 13, 1993. Two gunshots had been heard at 5:30 p.m. 54 SR 49. Hall's body was face down in the ditch with his hands up beside his head. 54 SR 63-64. Hall died of a gunshot wound to the head. 54 SR 32. The gunshot wounds to Hall's head were consistent with the murderer having leaned over him and fired the two shots, at close range, into his head while Hall was lying in the ditch. 54 SR 30.

Hall's vehicle was found the next day missing its tires, wheels, stereo, and speakers. 54 SR 99, 108. Pawnshop records indicated that Jones sold four tires with rims on the day of the murder for $75.00. Jones produced identification at the pawnshop and signed the bill of sale. 54 SR 114-15. Forensic document examiner Allen Southmayd compared the signature on the pawn ticket with Jones' known signature and concluded that the same person signed both. 56 SR 321-22.

On April 19, 1993, Lancaster police officer Chris Pearson approached a suspicious vehicle whose driver then drove into a housing project, got out of the vehicle, and fled. The vehicle had been reported stolen and contained a 380 automatic pistol with a bullet in the clip. 54 SR 119-24. Robert Pool, a firearms examiner, determined that the pistol found by Pearson fired the bullet retrieved from the body of Hall during the autopsy. 54 SR 136.

Derrick Rodgers, Jones' co-defendant who was awaiting trial for the same capital murder, testified that he, Jones, the mother of Rodgers' child, and several friends went to the Red Bird shopping mall on the afternoon of Hall's murder. 56 SR 276. They observed Hall and when he returned to his car, Jones got into the driver's seat, forcing Hall into the front seat with Jones, and Rodgers got in the back seat. Jones had a 380 caliber gun. 56 SR 279. Katoma Rodgers and a friend followed in another car. After the cars were parked in a rural area, Rodgers told Hall to get out of the car and run, but Jones refused to let Hall go since he could identify them. 56 SR 281. Jones shot Hall twice in the back of the head as Hall lay in the grass. Jones and Rodgers then left in Hall's car. 56 SR 283-84.

Jones and Rodgers met Katoma Rodgers and friends at a McDonald's. 56 SR 285. Katoma asked Jones why he killed Hall, and Jones told her he did it because Hall had begged for his life saying that he had a son. Jones told Katoma that he killed Hall so that he would not get to see his son. 56 SR 339.

Jones gave the police a statement, after speaking with his mother by telephone, in which he admitted that he had fired one of the shots that hit Hall in the head. 56 SR 301, 310.

2. Punishment Phase

The State produced evidence of other similar crimes by Jones. Charles Fulenwinder testified that near midnight on October 22, 1992, he observed his Cadillac in the middle of the street. When he went out to his car, a man ran from the rear of the car and shot at him three times. He identified Jones as the man who shot at him. 57 SR 402-3, 409.

Evidence of an additional three carjackings was introduced. 57 SR 447, 456-60, 470-74.

Several witnesses, including Jamoan Martin, testified about the murder of Kindra Buckner, a 20-year-old girl who left work shortly after 10 p.m. on September 20, 1993. Martin and Jones drove into the field in which she was walking and told her, at gunpoint, to get into the car. 61 SR 788-89. They parked the car and made her take off her clothes. 61 SR 789. Jones searched her purse and then shot her twice. 61 SR 791. After driving away, Jones became

concerned that she might still be alive and returned to the scene. Jones told Martin to shoot her with the shotgun, which he did. 61 SR 792-94. Jones then burned the car. 61 SR 794.

Dallas police officer Bruce Adams testified that on September 28, 1993, Jones was brought in and photographed. The photographs show Jones with burn marks and a bandage on his left arm. 60 SR 670-71. The State introduced a certified copy of Parkland Hospital records showing that Jones was treated for burns on his face and arms. 60 SR 672.

Diane McLucky, a Dallas police officer in the gang unit, testified that Jones was a member of the Crips. His tattoos identified him as a gang member. 61 SR 742-43.

The defense presented Dr. James Marquart, who testified on the issue of future dangerousness. 62 SR 846-57. In his opinion, Jones would not have been a threat to prison society. 62 SR 857.

James Carl McAbe, a clinical psychologist, testified as to his psychological evaluation of Jones. 62 SR 871-84.

Nine persons, including Jones' father, testified as character witnesses in mitigation of punishment.

REASONS FOR DENYING THE WRIT

I.

The Questions Presented for Review Are Unworthy of this Court's Attention.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. Jones advances no compelling reason in this case, and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II.

Jones' claim that the state court's refusal to follow its own precedent violates the Sixth, Eighth, and Fourteenth Amendments raises only a state law question and is thus not appropriate for the Court's review.

Jones claims that the Court of Criminal Appeals failed to follow its own precedent in holding that the wrongful exclusion of a juror on a purely state law matter was subject to harmless error analysis. In a circular fashion, he posits the argument that the erroneous exclusion of a juror in a capital case violates constitutional law which means that the jury was not fair and impartial and the trial was fundamentally unfair.

While Jones has cited numerous cases, none of the cases cited are authority for this position.

At the trial, the State challenged prospective juror Margaret Snyder and the challenge was sustained by the district court on the ground that Snyder would require the State to produce a higher degree of proof of credibility of an accomplice witness than of other witnesses. The court also indicated, but did not hold, that Snyder would not be qualified on her definition of society. 29 SR 2419.

On appeal, the Texas Court of Criminal Appeals held that Snyder was improperly excluded, but that such exclusion was not harmful and did not merit reversal. The Court of Criminal Appeals specifically found the error not to be of constitutional dimension, but instead "a mistaken application of Article 35.16(b)(3) [TEX. CODE CRIM. PROC.]." *Jones,* 982 S.W.2d at 391.

Jones contends that this Court has already concluded that the erroneous exclusion of a juror in a capital case violates a capital defendant's constitutional rights. *Witherspoon v. Illinois,* 391 U.S. 510 (1968). In *Gray v. Mississippi*, 481 U.S. 648 (1987), the Court held that the improper *Witherspoon* exclusion of a juror is not subject to harmless error review. *Gray*, 481 U.S. at 662. However, *Witherspoon* and its progeny, including *Gray*, do not stand for the proposition that a defendant in a capital case has an affirmative constitutional right to retain *Witherspoon* or otherwise qualified jurors. *See Ross v. Oklahoma*, 487 U.S. 81, 87 (1988) ("declin[ing] to extend the rule of *Gray* beyond its context: the erroneous '*Witherspoon* exclusion' of a

qualified juror in a capital case"). Thus, a claim that a juror was erroneously excluded on purely state law, non-constitutional grounds does not justify the granting of certiorari review.

Jones further contends that this Court has held that equal protection is violated when a qualified juror has been improperly excluded. Pet. at 17. He cites *Batson v. Kentucky,* 476 U.S. 79 (1986), and *Edmondson v. Leesville Concrete Co., Inc.,* 500 U.S. 614 (1991), in support of this contention and argues that Snyder has, under the holdings of those cases, a constitutionally protected right to sit as a juror unless disqualified or peremptorily challenged. He further claims that Jones has standing to complain of the violation of Snyder's rights. Pet. at 17-18. However, the Court of Criminal Appeals specifically found no *Batson* violation, and, as *Ross* has held, the Constitution is not implicated by the erroneous exclusion of a juror when that exclusion violates neither *Witherspoon* nor *Batson.*

Jones' claim that the wrongful exclusion of Snyder resulted in the State receiving an extra strike has been rejected. In *Ross,* the Court held that the loss of a peremptory challenge does not constitute a violation of the Sixth Amendment right to an impartial jury. Since peremptory challenges are created by statute and are not constitutionally required, the defendant is only entitled to receive that which he is provided by state law. *Ross v. Oklahoma,* 487 U.S. at 88-89. Jones has not alleged that he was denied a peremptory challenge, only that the State, due to the exclusion error, received, in effect, an additional challenge.

The Court has made clear that the appropriate determination is not whether a juror was wrongfully excluded on a non-constitutional basis, but instead whether the jury which sat was fair and impartial. Jones has advanced no argument that the jury was not impartial other than the circular one that he was denied an impartial jury because Snyder was erroneously rejected. Specifically, Jones contends that the Court of Criminal Appeals erred in finding that his only right was to a fair and impartial jury. Pet. at 20. Since that argument has been explicitly rejected in *Ross,* no claim of constitutional dimension is presented.

Jones' final contentions regarding Snyder's erroneous exclusion are limited to state law matters over which this Court has no jurisdiction. He contends that the court failed to follow its own precedent, thereby promulgating a retroactive rule which violates the *Ex Post Facto* Clause; that valid case law of Texas which Jones relied upon at trial was not followed; and that the state court's decision relies upon a case which is inappropriate in a death penalty context.

Jones contends that the Court of Criminal Appeals wholly disregarded its own previous rulings as to challenges for cause in capital cases, citing *Bell v. State,* 724 S.W.2d 780 (Tex.Cr.App. 1986), *Turner v. State,* 635 S.W.2d 734 (Tex. Cr.App. 1982), and *Grijalva v. State,* 614 S.W.2d 420 (Tex.Cr.App. 1981). Jones claims to have relied upon this case law at trial and at direct appeal.[3] Pet. 24. Obviously, the court may change its view of its own precedent without

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[3] Jones has not explained how he relied upon this case law and what detriment accrued from such reliance.

triggering constitutional concerns. To the extent that Jones attacks the Court of Criminal Appeals' failure to abide by the principle of stare decisis, he could have had no reasonable, objective expectation that this principle would guarantee him relief from his death sentence in this case. "Stare decisis is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne v. Tennessee*, 501 U.S. 808, 828(1991) (citation omitted). "The role of stare decisis, furthermore, is 'somewhat reduced . . . in the case of a procedural rule . . . which does not serve as a guide to lawful behavior.'" *Hohn v. United States*, 524 U.S. 236, ___, 118 S.Ct. 1969, 1977 (1998).

Jones finally contends that the court's failure to follow precedent constitutes the promulgation of a retroactive rule which abridges his constitutional rights and thus violates the rulemaking authority of the Court of Criminal Appeals and also the *Ex Post Facto* Clause. Pet. at 22. Whether the court has violated its authority to promulgate rules pursuant to state statute is not a constitutional issue. The court has, however, not done so and the allegation is meritless. Jones mistakes the court's decision in his case on direct appeal for a "rule" promulgated pursuant to the authority of the Texas Government Code. Section 22.108, TEX. GOVT. CODE, grants rulemaking power to promulgate rules for posttrial, appellate, and review procedure in criminal cases to the court. The clerk of the court then files such rules with the secretary of state and they are published in the Texas Register and in the Texas Bar Journal. This procedure was not followed with the court's holding in Jones' direct appeal for the obvious reason that it was a decision, not a rule.

The decision in Jones' direct appeal does not violate the *Ex Post Facto* Clause. While the *Ex Post Facto* Clause is generally considered to be a limitation upon the powers of the legislature and not applicable to the judiciary, *Frank v. Mangum*, 237 U.S. 309, 344 (1915), the principle that persons have a right to fair warning of that conduct which will give rise to criminal penalties is protected against judicial action by the Due Process Clause of the Fifth Amendment. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). In *Bouie,* the Court reversed trespass convictions which resulted from a judicial enlargement of the state criminal trespass statute. The Court held that such unforeseen judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law forbidden by Art. I, § 10, of the Constitution. What is protected by the *Ex Post Facto* Clause is the right to fair warning of that conduct which will give rise to criminal penalties. *Marks v. United States,* 430 U.S. 188, 191 (1997).

The decision of the Texas Court of Criminal Appeals did not enlarge the Texas capital murder statute or in any way extend the criminal penalties to which Jones would be subject. It simply applied state law to reach a decision regarding the error in excluding Snyder. Specifically, the court determined that the error was not of constitutional dimension since the improper exclusion did not violate *Witherspoon* or *Batson,* and then applied Rule 44.2(b), TEX. RULES APP. PROC., which requires that errors which are not of constitutional dimension and do not affect substantial rights be disregarded. If this resulted in a change in the case law regarding challenges for cause, such change did not enlarge the criminal offense with which Jones was charged. It also did not change any law on which Jones or his attorneys

relied in making decisions as to which jurors to challenge. Jones has not set forth one strategic decision that he or his attorneys would have changed nor identified a single juror or venire member whom they would have treated differently in exercising challenges as a result of this decision by the court. The only right at issue is the right to a fair and impartial jury, and Jones has not established that his jury did not meet the Sixth Amendment standard.

Jones has presented merely a state law claim that this Court is without jurisdiction to consider. In an attempt to create the indicia of a constitutional claim, Jones has argued that he has a constitutional right to every qualified juror not properly challenged, but such right does not exist. However the claim is posited, it remains a state law matter and unworthy of review.

III.

Jones failed to raise in the court below his claim that the introduction of evidence of unadjudicated offenses in the punishment hearing of capital cases violates the Eighth and Fourteenth Amendments; the claim is also without merit.

Jones next contends that the admission of evidence of unadjudicated offenses during the punishment phase of capital murder trials in Texas violates the capital defendant's Fourteenth Amendment rights to due process and equal protection and also the Eighth Amendment. Specifically, he suggests that such evidence is inherently unreliable and is only permitted in capital cases, state law barring

consideration of such evidence in all other criminal cases in Texas. *See* Pet. at 31. However, this issue was not raised and decided in the court below; therefore, this Court is without jurisdiction to pass on it. Moreover, even if the issue were properly before the Court, the issue is entirely without merit.

The cases are legion that this Court will not decide issues raised for the first time on petition for certiorari, and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n *Crowell v. Randall*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20 § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." *Cardinale v. Louisiana*, 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919). Moreover, on direct review,

> [w]hen "'the highest state court has failed to pass upon a federal question, it will be assumed

> that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'"

Bd. of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 550 (1987), *quoting Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), *quoting Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974), *quoting Street v. New York*, 394 U.S. 576, 582 (1969). Consequently, because the federal question raised in the instant petition for certiorari review was neither raised in nor decided by the Texas Court of Criminal Appeals, this Court cannot decide the issue.

Further, even assuming the issue was properly before this Court, Jones has failed to show that the admission of evidence of unadjudicated offenses in this case has resulted in the denial of his constitutional rights.

This precise claim has been rejected by the Fifth Circuit Court of Appeals. The Fifth Circuit has repeatedly held that the introduction of unadjudicated offenses does not violate a capital defendant's rights under the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment. *Callins v. Collins*, 998 F.2d 269, 276 (5th Cir. 1993), *cert. denied*, 510 U.S. 1141 (1994); *Duff-Smith v. Collins*, 973 F.2d 1175, 1184 (5th Cir. 1992); *Williams v. Lynaugh*, 814 F.2d 205, 207-08 (5th Cir.), *cert. denied*, 484 U.S. 935 (1987), *citing Milton v. Procunier*, 744 F.2d 1091, 1097 (5th Cir. 1984), *cert. denied*, 470 U.S. 1030 (1985). The Fifth Circuit has also held that the introduction of evidence of unadjudicated offenses during a capital

sentencing hearing while excluding such evidence in trials of non-capital defendants does not violate equal protection. *Harris v. Johnson,* 81 F.3d 535 (5th Cir.), *cert. denied* 517 U.S. 1227 (1996).

There is no support for Jones' argument that the Eighth Amendment prohibits the admission of unadjudicated offense evidence at the punishment phase of a capital murder trial. In fact, the Eighth Amendment supports the admission and jury consideration of all evidence relevant to the sentencing determination, whether aggravating or mitigating, in order to arrive at the most accurate determination possible. A capital defendant's criminal record and prior bad acts are aspects of his character and background that are properly considered by a jury in determining the appropriateness of a death sentence. *Barclay v. Florida*, 463 U.S. 939, 956-58 (1983).

Further, the determination in *Jurek v. Texas* that the Texas capital-sentencing statute was constitutional was premised in part on the fact that the jury was allowed to consider all possible information relevant to the punishment phase issues. 428 U.S. 262, 271, 274-76 (1976). As was stated in *Jurek*, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek*, 428 U.S. at 276.

Texas' interest in permitting sentencer consideration of the full range of relevant evidence is not merely legitimate but compelling. Admission of unadjudicated offense evidence furthers the state's interest in promoting the

accuracy of the sentencer's response to the future dangerousness issue. Where evidence is relevant the reliability of the evidence is an issue that goes to its weight rather than its admissibility. *Barefoot v. Estelle,* 463 U.S. 880, 898-99 (1983). Thus, the admission of the unadjudicated offense evidence did not deprive either Jones or any other capital defendant of a reliable sentencing determination under the Eighth Amendment.

Likewise, the Due Process Clause is not implicated by the admission of evidence of unadjudicated offenses during the punishment phase of trial. The law is clear that a sentencing body can consider a defendant's participation in criminal conduct for which he has not been convicted without violating due process. *United States v. Grayson,* 438 U.S. 41, 49 (1978), *citing Williams v. New York,* 337 U.S. 241, 252 (1949). The premise underlying the American system of criminal justice is that the adversary process and the trier of fact are "competent to uncover, recognize, and take due account" of weaknesses in evidence. *Barefoot v. Estelle*, 463 U.S. at 899. Jones had the opportunity to test the veracity and credibility of the witnesses, and to challenge the reliability of their testimony, through cross-examination. He had the opportunity, if he was able to do so, to rebut the State's case with evidence of his own.

Jones also alleges that because Texas allows for the introduction of unadjudicated offenses in capital sentencing trials but does not allow such evidence in noncapital cases, the Texas capital sentencing procedure violates his right to equal protection under the Fourteenth Amendment. The statutory scheme in Texas does not implicate equal protection

because capital defendants and non-capital defendants are not similarly situated, and any disparate treatment is rationally related to the state's legitimate interest in assuring that all relevant information is presented for consideration by a capital jury in answering the special issues.

Differences between the Texas capital and non-capital sentencing procedures warrant differential treatment of unadjudicated offense evidence. In capital cases, the jury's discretion is guided by consideration of special issues, and its responses to those issues determine punishment in a particular case. Tex. Code Crim. Proc. Ann. art. 37.071(b), (e). In non-capital cases, in contrast, the sentencer is free to assess any sentence within the range delineated by statute. Tex. Code Crim. Proc. Ann. art. 37.07. Capital and non-capital defendants, thus, are not similarly situated with respect to sentencing procedures.

Since capital defendants have not been found to be a suspect class for equal protection purposes, the rational basis test should be used to test Texas' sentencing procedure. Rational basis scrutiny requires only that the legislative classification rationally promote a legitimate governmental objective. This constitutional standard is "offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). The purpose of allowing evidence of unadjudicated offenses to be considered in the sentencing phase is to assist the jury in determining whether the defendant is likely to be a continuing threat to society. This evidence helps focus the jury on the particular circumstances of the individual offense and the individual offender. *Jurek*,

428 U.S. at 273. Admission of all evidence regarding the defendant at capital sentencing furthers the state's interest in assuring sentencer consideration of evidence about the individual defendant. It is directly relevant to the jury's assessment of future dangerousness, which is a constitutionally permissible sentencing criterion. *Barefoot v. Estelle*, 463 U.S. at 896. "Consideration of a defendant's past conduct as indicative of his probable future conduct is an inevitable and not undesirable element of capital sentencing." *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986). Texas has a strong interest in ensuring that all relevant evidence concerning the capital defendant is placed before the jury so that it can consider the evidence when answering the special issues. In furthering this interest, the state could rationally decide that different procedures should be used for capital defendants than for noncapital defendants. Jones' second claim also does not merit the granting of certiorari review.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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